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In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS BARNES MCCRANIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether encounters between petitioner and law enforcement officers at two airports constituted unlawful seizures.

2. Whether a warrant authorizing the search of petitioner's luggage was improperly procured through subterfuge.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A18) is reported at 703 F.2d 1213.

JURISDICTON

The judgment of the court of appeals was entered on March 25, 1983. A petition for rehearing was denied on May 13, 1983 (Pet. App. A19). On June 23, 1983, Justice White extended the time for filing a petition for a writ of certiorari to and including August 10, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of his suppression motion and a bench trial on stipulated facts and the suppression hearing record in the United States District Court for the

Northern District of Oklahoma, petitioner was convicted on one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment and a two-year special parole term (Pet. App. A1). The court of appeals affirmed.

1. As summarized in the opinion of the court of appeals (Pet. App. A4-A7), the government's evidence showed that on the morning of September 22, 1981, DEA Agent Paul Markonni was on surveillance duty at the Atlanta airport when petitioner entered the terminal from an arriving flight. Markonni, who had worked at the airport for approximately three years and had served with the DEA or its predecessor agencies for approximately 12 years, concluded that petitioner's actions in repeatedly interrupting a conversation with an airline agent and turning to look at him seemed suspicious. When petitioner walked down the concourse and again looked over his shoulder, Markonni decided to investigate further. Tr. 9-10.

Agent Markonni learned petitioner's name from airline personnel and learned that petitioner was traveling from Fort Myers, Florida. The agent also discovered that petitioner had flown from Fort Myers to Tampa, Florida, and then on to Atlanta, having altered prior reservations that called for a direct flight. Finally, Agent Markonni learned that petitioner was scheduled to catch yet another flight to Tulsa, Oklahoma. Markonni and another officer then went to the gate where petitioner was waiting for his Tulsa flight. There they observed him watching baggage being loaded onto the flight, in a manner Markonni considered unusual. Tr. 13-14. Upon further inquiry of airline personnel, Markonni found that petitioner had purchased a one-way ticket from a travel agent. After receiving a busy signal upon attempting to call the contact telephone number petitioner had given when he made his reserva-

tion, Markonni decided to approach petitioner. Identifying himself as a federal officer, Markonni sat in the seat next to petitioner and asked if he could speak with him. Petitioner assented. At Markonni's request, petitioner identified himself, agreed to produce his airline ticket and driver's license, and, in response to a question, explained that he was going to Tulsa to visit his children and former wife. Observing that petitioner was becoming increasingly nervous during the course of their conversation, that petitioner's hands were shaking, and that his breathing was becoming shallow, Markonni informed petitioner that he was a narcotics officer, asked whether petitioner was carrying drugs, and sought permission to search petitioner's person and his luggage. Tr. 16-17. Petitioner agreed to a search of his person; he refused, however, to permit a search of his luggage (Tr. 17). Markonni then broke off the conversation, telling petitioner that he was free to leave and could do whatever he wished, but that he could expect to be met by other agents and possibly a drug detecting dog upon his arrival in Tulsa (Tr. 18).

After petitioner boarded his flight, Markonni went to the baggage facility and located petitioner's luggage so that he could provide a description of it. He also contacted the sheriff's office in petitioner's home county and learned that petitioner had a criminal record that included arrests for sale and possession of narcotics, grand larceny, and aggravated assault. Tr. 23-24. Markonni then contacted a DEA agent in Tulsa, relaying his suspicion that petitioner's luggage contained drugs, describing petitioner's checked luggage, and informing his counterpart of petitioner's arrest record (Tr. 26).

When petitioner arrived at the Tulsa airport, he collected his luggage and rented a car. Before petitioner reached the airline terminal exit, however, the DEA agent whom Markonni had contacted, accompanied by a

Tulsa police officer, approached, identified himself, and asked to speak with petitioner. When petitioner agreed,[1] they moved to a seating area. After reading petitioner his *Miranda* rights, the agent requested permission to search his luggage. Pet. App. A6; Tr. 55-57, 89-90. When petitioner refused, the agent summoned a specially trained dog. The dog that was available was trained in the detection of explosives but had proven capable of detecting hidden drugs as well. After approximately two minutes, the dog arrived and twice alerted on petitioner's luggage. At this point, petitioner had been delayed less than 10 minutes. Tr. 98, 114-118; Pet. App. A12.

After the dog alerted, the DEA agent took petitioner and his suitcase to the airport security office. Petitioner was permitted to telephone an attorney. A bomb technician took control of his luggage and began to examine it for the presence of explosives. When petitioner inquired whether he was under arrest, he was told that he was not, and that he was free to go. Thereafter petitioner freely departed. Tr. 60, 96, 106.

The DEA agent then sought a warrant to search petitioner's luggage. The affidavit accompanying the warrant application detailed Agent Markonni's observations, petitioner's arrest record, and the detecting dog's reaction upon exposure to petitioner's luggage which, based upon the animal's record and training, "indicat[ed] the presence of explosive materials." Pet. App. A24. The warrant stated that the magistrate was satisfied there was probable cause to believe explosives or explosive components were concealed in the luggage (Pet. App. A25). After x-ray and fluoroscope examinations failed to reveal the presence of explosives, the officers opened the luggage and found a white powdery

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[1] In response to petitioner's inquiry, the Tulsa police officer informed him that he was not under arrest (Tr. 57).

substance, subsequently determined to be cocaine (Tr. 170-171).

2. The district court denied petitioner's motion to suppress. It concluded that petitioner's encounters with the DEA agents in Atlanta and Tulsa were not unlawful seizures and that the search warrant was properly issued based upon probable cause (Tr. 233; Pet. App. A7-A8).

The court of appeals affirmed, rejecting petitioner's contentions that he had been illegally seized by the police and that the exposure of his luggage to the specially trained dog constituted an illegal search. The court of appeals held that Agent Markonni's encounter with respondent in Atlanta constituted only a consensual "police-citizen contact" rather than a seizure (Pet. App. A9-A11). Moreover, the court held, the information relayed by Agent Markonni to his counterpart in Tulsa created sufficient suspicion to provide an adequate predicate for an investigatory stop of petitioner in Tulsa, including the summoning of the specially trained dog (*id.* at A11). The exposure of petitioner's luggage to the dog was not itself a search (*id.* at A11-A12), and the dog's signal in response to the luggage provided probable cause to believe the luggage contained contraband (*ibid.*).

Judge McKay dissented (Pet. App. A14-A18). Although he agreed that petitioner's encounter with Agent Markonni in Atlanta could be viewed as "'inoffensive contact between a member of the public and the police'" (*id.* at A16, quoting *United States* v. *Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.)), he regarded the ensuing encounter at the Tulsa airport as an unlawful seizure, finding insufficient suspicion to justify it.

ARGUMENT

1. Petitioner contends (Pet. 2, 9-14) that his encounters with the police at the Atlanta and Tulsa airports

constituted unlawful seizures. This fact-bound question, resolved against petitioner by both courts below, warrants no further review by this Court.

a. The encounter between petitioner and Agent Markonni at the Atlanta airport was not a seizure. It is settled that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). In *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (citations omitted), Justice Stewart explained:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

A majority of this Court has now endorsed Justice Stewart's statement of the applicable law. *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6, 10 (opinion of White, J.); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting).

Here, as in *Mendenhall*, 446 U.S. at 555, Agent Markonni's brief encounter with petitioner occurred in a public place; he displayed no weapons, nor did he do anything to suggest that petitioner was not at liberty to leave or terminate the conversation. Instead, Markonni merely sat down next to petitioner, posed a few questions, and asked but did not demand to see petitioner's identification and ticket. Under the circumstances, both

the majority and Judge McKay properly concluded that the encounter was nothing more than a consensual contact between the police and a member of the public. See, *e.g.*, *United States* v. *Moya*, 704 F.2d 337, 339 (7th Cir. 1983), petition for certiorari pending, No. 83-253 (filed Aug. 15, 1983); *United States* v. *Jensen*, 689 F.2d 1361, 1363 (11th Cir. 1982); compare *Royer*, slip op. 12-13 n.9 (opinion of White, J.). It is, therefore, immaterial whether, as petitioner claims, Agent Markonni lacked sufficient reasonable suspicion to effect a non-consensual stop.

b. Petitioner's claim (Pet. 12) that his encounter with police upon arrival at the Tulsa airport entailed a violation of the Fourth Amendment is also insubstantial. It is axiomatic that not all seizures of the person need be justified by probable cause to arrest for a crime. Brief seizures for the purpose of questioning a suspect or taking other steps to investigate possibly criminal behavior are permissible under the Fourth Amendment if there is articulable suspicion that the person has committed or is about to commit a crime. See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5-6; *Royer*, slip op. 6 (opinion of White, J.). Investigative measures to verify or dispel suspicion that a person is carrying contraband can also include brief detention of the suspect's luggage to permit its exposure to a sniffing dog. See *Place*, slip op. 7-9.

Agent Markonni may have lacked sufficient information forcibly to detain petitioner at the time of his initial encounter with him in Atlanta. But by the time petitioner arrived at the Tulsa airport, law enforcement officers possessed sufficient facts to justify suspicion that he was carrying contraband to permit his momentary detention in order to summon a trained dog. Markonni, a

highly experienced DEA agent,[2] initially became suspicious when petitioner looked at him repeatedly while seeking flight information from an airline agent in Atlanta. Upon inquiry, Markonni learned that petitioner had purchased a one-way ticket from Fort Myer, Florida, a source city for drugs, and was flying to Tulsa, Oklahoma, via an unusual route that involved two transfers. Markonni's suspicions were heightened when, after identifying himself as a DEA agent and asking petitioner whether he was carrying drugs, petitioner became increasingly nervous, shook, and began to breathe in an unusual manner. Following petitioner's departure on the flight to Tulsa, Markonni learned that petitioner had a substantial arrest record, including a prior arrest for sale and possession of narcotics. Agent Markonni communicated all of these facts to his counterpart in Tulsa. The courts below properly concluded that, "based upon the whole picture" (*United States* v. *Cortez*, 449 U.S. 411, 421-422 (1981)), experienced law enforcement officers could reasonably surmise that petitioner might be engaging in criminal activity. Of course when, after a brief detention based upon these factors, a trained dog indicated that petitioner's luggage contained some kind of contraband (see pages 9-11, *infra*), the officers' suspicion ripened into probable cause that fully justified any subsequent detention.[3]

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[2] See, *e.g.*, *United States* v. *Sanford*, 658 F.2d 342, 345 (5th Cir. 1981); *United States* v. *Berd*, 634 F.2d 979, 981 n.1 (5th Cir. 1981).

[3] There is no merit to petitioner's claim (Pet. 11) that under *Dunaway* v. *New York*, 442 U.S. 200 (1979), the officers' initial stop at the Tulsa airport exceeded the permissible scope of an investigatory stop under *Terry*. In *Dunaway*, the defendant was taken into custody at a friend's home, driven to police headquarters, and placed in an interrogation room, where he was questioned for almost an hour. 442 U.S. at 203. Here, by contrast, the police merely accompanied petitioner to a public seating area of the Tulsa airport, where, after obtaining permission

3. Petitioner also claims (Pet. 18-21) that the warrant authorizing a search of his luggage was improperly issued. In particular, he argues that the affidavit supporting issuance of the warrant to search for an explosive device was a mere subterfuge and that the officers actually wished to examine petitioner's luggage for the purpose of locating drugs. Petitioner did not raise this issue in the court of appeals and it plainly was not addressed by that court (see Pet. App. A8). Consideration of this issue in this Court is accordingly inappropriate. *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-9; *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). Petitioner's contention is, in any event, unfounded.

We note at the outset that if, based on the reactions of the dog that examined petitioner's luggage, the officers were uncertain whether the contents of the luggage that triggered the reaction were more likely illegal drugs or explosives, the predicate for undertaking a search would in no way be diminished. See, *e.g.*, *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949)

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to speak with him, they informed him that he was not under arrest and requested permission to examine his luggage. After he did not consent to a search of his luggage, they detained him for approximately two minutes until the arrival of a trained dog. Tr. 57; Pet. App. A6.

Nor is there any merit to petitioner's contention (Pet. 15-18) that exposure of his luggage to a dog constituted an unlawful search. In *Place*, slip op. 11, the Court held that "exposure of * * * luggage * * * located in a public place, to a trained canine [does] not constitute a 'search' within the meaning of the Fourth Amendment." Following *Place*, the Ninth Circuit's inconsistent decision in *United States* v. *Beale*, 674 F.2d 1327 (1982), upon which petitioner relies, was vacated and remanded for reconsideration when the Court granted certiorari. No. 82-674 (June 27, 1983). Of course, the brief detention of petitioner's luggage—a seizure (but not a search)— required reasonable suspicion. But the facts that supported the brief detention of petitioner also supported detention of his luggage. See *Place*, slip op. 11-12.

("Probable cause exists where 'the facts and circumstances * * * warrant a man of reasonable caution in the belief that' *an* offense has been or is being committed" (emphasis added; citation omitted).). A rule that precludes law enforcement action because of uncertainty as to the precise nature of the crime committed would scarcely comport with the non-technical nature of the probable cause standard. See *Brinegar*, 338 U.S. at 175-176. In any event, the undisputed facts of this case belie petitioner's contention that the officers falsely stated that they suspected the presence of explosives.

It is true that, at the time petitioner was stopped at the Tulsa airport, his suspicious conduct prompted law enforcement officers to believe he was probably a drug courier. However, the response of the detecting dog, which the district court characterized as having "minored in drugs and majored in explosives" during his training (Pet. App. A7; see Tr. 118-119), prompted the officers to believe that petitioner was instead carrying explosives. Acting upon the basis of this belief, the officers immediately summoned a Federal Alcohol, Tobacco and Firearms investigator and surrendered custody of petitioner's luggage to a bomb disposal technician, who moved it to the security area of the airport (Tr. 59, 151-152). There, the technician examined it with a listening device "to see if there was anything ticking in it" (Tr. 69, 152). Following procurement of the warrant, which authorized a search of the luggage for concealed explosives, the technician, aided by an ATF agent, once again listened to the luggage with a stethoscope, x-rayed it to detect the presence of wires or other indicia of an explosive device, and finally fluoroscoped it (Tr. 154, 170). When none of these measures revealed the presence of a bomb, petitioner's suitcase was opened it to make sure that it did not contain a device that could not be detected by the use of less intrusive measures (Tr. 153-154). The investigative techniques

employed by law enforcement authorities clearly undercut petitioner's claim that the statement made in the warrant application that the officers believed the luggage contained explosives constituted a subterfuge.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

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[4] It is settled that contraband not specified as the object of investigation in a search warrant but inadvertently discovered during its execution is fully admissible. See, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971).

Petitioner suggests (Pet. 20) that the warrant was invalid because it contained deliberate falsehoods or statements made in reckless disregard for their truth and that the cocaine found in his suitcase accordingly should have been suppressed. See, *e.g.*, *Franks* v. *Delaware*, 438 U.S. 154 (1978). Petitioner has not identified anything in the search warrant affidavit, which described Markonni's observations of him in Atlanta, his arrest record, the detecting dog's behavior upon exposure to petitioner's luggage and the dog's "track record" in explosive identification, that is inaccurate.